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THE MODERN STATUS OF THE RULES PERMITTING A JUDGE TO PUNISH DIRECT CONTEMPT SUMMARILY

Summary contempt is a legal sanction deeply entrenched in the Anglo-American judicial system. In general, a judge may impose criminal penalties without a plenary hearing for conduct occurring in the presence of the court.¹ This power creates a conflict between judicial power to assure a smooth and unobstructed flow of justice and fundamental notions of criminal procedural due process.² Because due process plays a central role in this country's legal system, courts must justify clearly any abridgment or modification of procedural rights.

1. See Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 221 (1971).

Courts characterize contempt according to two schemes: criminal or civil contempts and direct or indirect contempts. See, e.g., O. FISS & D. RENDLEMAN, *INJUNCTIONS* 837-38 (2d ed. 1984). The criminal/civil distinction usually is based on the purpose for which the contempt sentence is applied. If the sentence is remedial or corrective, the contempt is classified as civil. See, e.g., *Shillitani v. United States*, 384 U.S. 364, 368-70 (1966); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911); *Vanderkooi v. Echelbarger*, 250 Ind. 175, 179, 235 N.E.2d 165, 167 (1968); *Winter v. Crowley*, 245 Md. 313, 317, 226 A.2d 304, 307 (1967); *Godard v. Babson-Dow Mfg. Co.*, 319 Mass. 345, 347, 65 N.E.2d 555, 557 (1946). On the other hand, if the relief is punitive in nature the contempt is criminal. See, e.g., *State ex rel. Buckson v. Mancari*, 43 Del. Ch. 236, —, 223 A.2d 81, 82 (1966); *Shiflet v. State*, 217 Tenn. 690, —, 400 S.W.2d 542, 543 (1966).

If the contempt is criminal, then constitutional safeguards for criminal trials will attach; but if the contempt is civil, such safeguards will not attach. Cf. *United States v. United Mine Workers*, 330 U.S. 258, 295-301 (1947); *Id.* at 342, 363-76 (Rutledge, J., dissenting). Additionally, civil sentences, at least incarcerations, are indeterminate—valid only while the trial is in progress—because their purpose is to coerce compliance with the court's order. See *Shillitani*, 384 U.S. at 371; *Maggio v. Zeitz*, 333 U.S. 56, 74-77 (1948). Conversely, criminal sentences are determinate.

The distinction between indirect and direct contempts focuses on where or how the contempt was committed. If the conduct occurred in the presence of the court, the contempt is direct; if it occurred outside the court's presence, the contempt is indirect. See, e.g., *In re Oliver*, 333 U.S. 257, 274-76 (1948); *Cooke v. United States*, 267 U.S. 517, 534-35 (1925). Rule 42 of the Federal Rules of Criminal Procedure reinforces this distinction. Consequently, direct contempts are subject to summary disposition while indirect contempts must be afforded notice and hearing. See FED. R. CRIM. P. 42; *infra* note 3.

2. Recognizing the unique features of this offense, courts have classified contempt as sui generis—neither civil nor criminal. *Myers v. United States*, 264 U.S. 95, 103 (1924); *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 326 (1904). More recently, however, the Supreme Court recognized that "criminal contempt is a crime in every fundamental respect." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968).

Federal courts derive their summary contempt power from Federal Rule of Criminal Procedure 42.³ After this rule became effective in 1946, courts broadly construed the scope of a federal court's summary contempt power.⁴ Recent developments, however, suggest a narrowing of this power.⁵ This Note examines these developments and concludes that federal appellate courts should expand their review of the exercise of summary contempt power by applying greater scrutiny to the trial record and by expressly deciding whether prompt action was necessary.

ORIGIN AND POLICIES OF SUMMARY CONTEMPT

Origin

Early English common law recognized an inherent judicial power to keep order in the court and to protect the court's dignity. Referring to Blackstone's *Commentaries*, the United States Court of Appeals for the Second Circuit observed that early courts based the contempt rationale on a theory of punishment for disturbance of public justice.⁶ Heavily influenced by the English tradition, American courts basically accepted this rationale.⁷ In *Anderson v. Dunn*,⁸ the Supreme Court imposed a requirement that contempt

3. Rule 42 states:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of the rule shall be prosecuted on notice. . . . If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

4. See *infra* text accompanying notes 36-65.

5. See *infra* text accompanying notes 66-137.

6. *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984).

7. "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

8. 19 U.S. (6 Wheat.) 204 (1821). Although *Anderson* dealt with *congressional* contempt power, *id.* at 230, subsequent cases cited *Anderson* for the proposition that courts are subject to the same limitation. See, e.g., *United States v. Wilson*, 421 U.S. 309, 319 (1975);

power be limited to the "least possible power adequate to the end proposed" In the ensuing years, courts have noted this limitation, but whether they actually have adhered to it is less than clear.

The Supreme Court further indicated its perception of the origin and breadth of the contempt power in *United States v. Shipp*.¹⁰ The Court held in *Shipp* that the "[p]ower to punish for contempt is inherent in all courts for the purpose of enforcing judgments and orders and compelling submission to lawful mandates, as well as for the purpose of preserving order and imposing respect and decorum in the presence of the court."¹¹

In addition to tracing the origins of the contempt power to the inherent powers of courts,¹² federal courts also have found that the contempt power stems from acts of Congress.¹³ In fact, the Supreme Court now adheres to the latter view.¹⁴ In accord with this approach, Congress vested lower federal courts with the contempt power in title 18, section 401, of the United States Code;¹⁵ in addi-

Harris v. United States, 362 U.S. 162, 165 (1965); United States v. Lumumba, 741 F.2d 12, 15 (2d Cir. 1984).

9. *Anderson*, 19 U.S. (6 Wheat.) at 231.

10. 203 U.S. 563 (1906).

11. *Id.* at 565 (citing *Ex parte Terry*, 128 U.S. 289 (1888); *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821)); see also *Robinson*, 86 U.S. (19 Wall.) at 510.

12. See *In re Atchison*, 284 F. 604, 606 (S.D. Fla. 1922). The court provided its own question and answer: "Is the power of the courts to punish for the willful violation of an order duly and properly made inherent in the court, or is it dependent upon legislation? It can scarcely be questioned in this day that such power is inherent in the courts." *Id.*

13. See *Ex parte Poulson*, 19 F. Cas. 1205, 1207 (E.D. Pa. 1835) (No. 11,350). The court stated:

There can be no doubt of the constitutional power of congress to act upon this subject [the contempt power], as far as respects our courts. It is no invasion of the rights of a suitor to bring or defend a suit, or in any way affects it legal remedy, in the ordinary course of justice. It is in the discretion of the legislative power to confer upon courts a summary jurisdiction to protect their suitors or itself by summary process, or to deny it.

Id. The Supreme Court supported this view of the origin of the contempt powers for lower federal courts when examining the impact of congressional action upon its own contempt powers. The Court stated: "An act of Congress controls the courts of its own creation [i.e., lower federal courts], but not this court . . ." *Shipp*, 203 U.S. at 566.

14. In *Sacher v. United States*, 343 U.S. 1 (1952), the Court referred to "the statute which confers power on a federal court to punish for contempt." *Id.* at 6 (citing 18 U.S.C. § 401 (1982)).

15. 18 U.S.C. § 401 (1982). The section provides:

tion, section 402 provides for criminal prosecution of contempts also constituting crimes, but provides explicitly that "all other cases of contempt not specifically embraced in this section may be punished *in conformity to the prevailing usages at law*."¹⁶ The statutory scheme thus permits the judiciary to determine which types of contempt merit procedural due process and which types may be punished summarily.

Rule 42 of the Federal Rules of Criminal Procedure defines the procedure for exercise of a federal court's contempt power. The Supreme Court promulgated the rule in 1944, and it became effective in 1946 with Congress's acquiescence.¹⁷ The rule was intended to "make more explicit 'the prevailing usages at law' by which [section 402] has authorized punishment of contempts."¹⁸ Rule 42(b) states the general rule,¹⁹ requiring notice and hearing in all cases except those instances that fall within the narrowly drawn exceptions of direct criminal contempt in rule 42(a), which is the operative vehicle for the summary contempt power. Rule 42(a) allows a summary proceeding when the contempt was committed in the presence of court and upon certification by the judge that he or she saw or heard the conduct constituting the contempt. This requirement was not a novel statutory innovation. The drafters of rule

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

1. misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
2. misbehavior of any of its officers in their official transactions;
3. disobedience or resistance to its lawful writ, process, order, rule, decree or command.

Most courts have accepted that four requirements are necessary to support a criminal contempt conviction under § 401(1). First, the conduct at issue must constitute misbehavior; second, the misbehavior must amount to an obstruction of the administration of justice; third, the conduct must have taken place within the court's presence; and fourth, the actor must have intended to obstruct justice. *United States v. Seale*, 461 F.2d 345, 366-67 (7th Cir. 1972); *see Vaughn v. City of Flint*, 752 F.2d 1160, 1167 (6th Cir. 1985); *United States v. Warlick*, 742 F.2d 113, 116 (4th Cir. 1984); *Gordon v. United States*, 592 F.2d 1215, 1217-18 (1st Cir.), *cert. denied*, 441 U.S. 912 (1979); *United States ex rel. Robson v. Oliver*, 470 F.2d 10, 12 (7th Cir. 1972).

16. 18 U.S.C. § 402 (1982) (emphasis added).

17. *Sacher v. United States*, 343 U.S. 1, 8 (1952).

18. *Id.* at 7.

19. *See supra* note 3.

42(a) intended to codify the preexisting common law of contempt.²⁰

Policies

The Supreme Court has advanced two alternative theories to justify the summary contempt power.²¹ The outcome of a particular case depends largely upon which of these two theories a court follows.²² Although the second approach is a more recent development than the first, it has not replaced the first approach completely. Resolving this dichotomy is imperative because a summary criminal contempt conviction occurs without the formalities usually associated with a criminal proceeding; summary criminal contempt proceedings lack such safeguards as service of process, oral arguments, briefs, witnesses, cross-examination, and trial by jury.²³ Because summary contempt proceedings lack these safeguards, courts must understand clearly when the use of such proceedings is permissible.

The first approach permits the use of summary contempt proceedings whenever the offensive conduct occurs in the judge's presence.²⁴ Because the judge is present and observes the offensive conduct, further procedures designed to unveil the truth are superfluous. The judge merely applies the law to the facts as he or she sees them; no additional factual determination is needed. The

20. FED. R. CRIM. P. 42 advisory committee's note. The committee cited *Ex parte Terry*, 128 U.S. 289 (1888), and *Cooke v. United States*, 267 U.S. 517 (1925), as enunciations of that law. *But see* *Groppi v. Leslie*, 404 U.S. 496, 503-04 (1972) ("A legislature, like a court, must, of necessity, possess the power to act 'immediately' and 'instantly' to quell disorders in the chamber . . .").

21. *Compare* *Sacher v. United States*, 343 U.S. 1, 9 (1952) ("The Rule [FED. R. CRIM. P. 42] allows summary procedure only as to offenses within the knowledge of the judge because they occurred in his presence.") *with* *United States v. Wilson*, 421 U.S. 309, 316 (1975) ("[W]hen [behavior] disrupts and frustrates an ongoing proceeding, . . . summary contempt must be available to vindicate the authority of the court . . .").

22. *See generally* Kuhns, *The Summary Contempt Power: A Critique and a New Perspective*, 88 YALE L.J. 39 (1978) (analyzing the summary contempt power in light of these two rationales).

23. *Sacher*, 343 U.S. at 9. In a nonsummary hearing, requirements of due process include "the right to be adequately advised of charges, a reasonable opportunity to meet the charges by way of defense or mitigation, representation by counsel, and an adequate opportunity to call witnesses." *Ungar v. Sarafite*, 376 U.S. 575, 589 n.9 (1964).

24. *See Sacher*, 343 U.S. at 9; *supra* note 21.

approach is designed to promote efficiency in the judicial process.²⁵ A more critical analysis poses the further question of whether this "summary" process is indeed sufficient to protect the liberty interest at stake. While this approach probably reflects a more accurate literal interpretation of the language of rule 42(a), it is less satisfying than the second approach.

The second approach dictates that courts should use a summary proceeding only to assure the smooth administration of justice and to preserve order and decorum in the courtroom. This interpretation follows logically from the historical origins of the contempt power.²⁶ Courts must recognize that exercise of the summary contempt power essentially suspends procedural due process rights and thus should use such power only when absolutely necessary to prevent obstruction of the judicial process.²⁷ Courts should not adhere to the efficiency-based rationale of the first approach because, when carried to its logical conclusion, it ignores the existence of due process problems.

The effect of this dichotomy of rationales on the ultimate disposition of the case is profound. Appellate courts viewing summary contempt under the first approach are more likely to sustain a broader exercise of the summary power, permitting the use of this power when immediate action is not necessary to maintain order or salvage the proceedings.²⁸ In contrast, courts analyzing summary contempt based on the strict necessity rationale hold that the trial judge should use the contempt power in more limited circumstances—when the judge has seen all relevant conduct and exercise

25. To justify the summary contempt power, the Supreme Court observed that "[t]o submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency." *In re Debs*, 158 U.S. 564, 595 (1895).

26. Early Supreme Court decisions refer to the use of the contempt power as justified when used to ensure order and decorum in the courtroom and to enforce court orders. *See, e.g., Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1873); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821).

27. *See Green v. United States*, 356 U.S. 165 (1958) (Black, J., dissenting); *see also United States v. Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987).

28. *See, e.g., Sacher v. United States*, 343 U.S. 1 (1952); *In re Gustafson*, 650 F.2d 1021 (9th Cir. 1981).

of the summary power is necessary to preserve the orderly functioning of the court.²⁹

THE FIRST APPROACH

*Ex parte Terry*³⁰ provides an example of early Supreme Court analysis of the summary contempt power. Purporting to rely on the origin and development of the summary contempt power in English and American legal history, the Court in *Terry* found no inherent conflict between the summary contempt power and the liberty of the citizen. The Court reasoned that if a judge could not punish for contempt without notice and opportunity to be heard, summary contempt could not exist at all.³¹ Because courts need summary contempt to protect themselves and to discharge their functions, the Court rejected the notion that courts must afford notice and an opportunity to be heard in every summary contempt proceeding.³²

Although the Court recognized the potential for abuse and hasty or arbitrary application, the Court did not believe that these criticisms justified the abolition of the power: "Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice."³³

In the abstract, protection of individual liberties is compromised when courts are unable to discharge their functions properly. Proponents of a strong summary contempt power assert that such a power is needed to protect individual liberties by assuring an or-

29. See, e.g., *United States v. Wilson*, 421 U.S. 309, 315-16, 319 (1975); *Codispoti v. Pennsylvania*, 418 U.S. 506, 513-15 (1974); *Taylor v. Hayes*, 418 U.S. 488, 497 (1974); *Harris v. United States*, 382 U.S. 162, 164-65 (1965); *United States v. Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987); *United States v. Lumumba*, 741 F.2d 12, 16 (2d Cir. 1984).

30. 128 U.S. 289 (1888). In *Terry*, the trial court had summarily convicted an attorney for contempt after the attorney assaulted a marshal who, pursuant to the court's order, was removing the attorney's wife from the courtroom. The attorney contested the contempt conviction on grounds of lack of notice and opportunity to be heard. *Id.* at 299.

31. *Id.* at 309.

32. *Id.* "The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." *Id.* at 312 (quoting *Middlebrook v. State*, 43 Conn. 257, 268 (1876)).

33. *Id.*

derly trial process.³⁴ In practice, however, actual damage to the liberty of the citizen results from the *exercise* of summary contempt power. The argument that contempt power is necessary certainly carries substantial weight. The mere assertion that contempt power should exist, however, does not answer the equally substantial objections to the summary exercise of that power.³⁵

Congress codified the principles of *Terry* in rule 42,³⁶ and the Supreme Court first reviewed the rule in *Sacher v. United States*.³⁷ In *Sacher* the Court considered whether a judge summarily could find a person in contempt at the conclusion of the trial instead of exercising the power when the incidents actually occurred. At the conclusion of a nine-month trial of Communist Party leaders for conspiracy to overthrow the government by force or violence, the trial court found the defense attorneys and one of the defendants, who had elected to represent himself, guilty of contempt.³⁸

The Supreme Court concluded that the same reasons that led to the creation of a judicial contempt power mandate its being summary.³⁹ The Court stated that the primary purpose of a conventional trial court's procedures was to inform the court of events not

34. See, e.g., *id.* at 306-07. The Court acknowledged the "general rule" that courts must afford defendants notice and an opportunity to be heard, but stated that with reference to summary punishment for contempts committed "in the face of the Circuit Court,"

there is another rule, of almost immemorial antiquity, and universally acknowledged, which is equally vital to personal liberty, and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law.

Id. at 307.

35. Some commentators argue for abolishing the summary power altogether. See, e.g., Comment, *Counsel and Contempt: A Suggestion That the Summary Power Be Eliminated*, 18 Duq. L. Rev. 289 (1980) (concluding that the threat of a later conviction will deter obstructions of the judicial process as well as a conviction summarily imposed).

36. FED. R. CRIM. P. 42 advisory committee's note. Rule 42 also encompasses the rationale of *Cooke v. United States*, 267 U.S. 517 (1923), with regard to indirect contempts. FED. R. CRIM. P. 42 advisory committee's note. *Terry* does not reach the question of conviction without hearing and notice when exercise of the power is delayed.

37. 343 U.S. 1 (1952).

38. *Id.* at 3.

39. *Id.* at 8; see *supra* note 31 and accompanying text.

previously within its knowledge.⁴⁰ As a result, such procedures are not needed when courts exercise summary contempt power because the court was aware of and had knowledge of the events warranting the proceedings.⁴¹

Although informing the court of events not within the court's knowledge is an unquestionably important function of conventional court procedures, the ultimate purpose of those procedures is to achieve justice and fairness. The reason that courts must be informed of events not within their knowledge is to enable them to provide the best decision under the circumstances for the individual litigants. The procedures dismissed so easily by the Supreme Court in *Sacher* are the foundation of due process.

Undoubtedly influenced by the clearly contemptuous behavior of the parties involved in *Sacher*,⁴² the Court held that the trial judge had discretion to wait until the end of the trial before exercising summary contempt power.⁴³ The Court stated that requiring immediate exercise of the summary contempt power could have a more detrimental effect on the smooth functioning of the trial proceeding by depriving parties of counsel if the court immediately imposed sentence or, if the court waited to sentence, by prejudicing the jury against a party by reprimanding the party's attorney for misconduct.⁴⁴ The Court sought to avoid a construction of rule 42 which would allow counsel to use contemptuous conduct to ma-

40. *Id.* at 9.

41. *Id.*

42. The occurrences spurring the contempt charge included disobeying the court's instructions and orders to desist from disruptive behavior; ignoring the court's procedural instructions as to the timing and content of motions, offers of proof, etc.; repeatedly continuing to object and argue after the court had overruled objections; and making insulting and insolent references to the court. *United States v. Sacher*, 182 F.2d 416, 430 (2d Cir. 1950), *aff'd*, 343 U.S. 1 (1952). The insulting references to the court included the following: "I think lawyers who are defending their clients for their liberty should not be treated as though they were dogs," *id.* at 438; "certain illusions . . . have been shattered because of the prejudicial actions of the Court," *id.* at 442; "I rise, first of all, your Honor, to protest most vigorously against the outrageous and arbitrary ruling which you have just made," *id.* at 442; direction to counsel to conclude arguments by a specific time "makes a mockery of justice," *id.* at 442; "his Honor's mind is closed to any grounds that I might state," *id.* at 452; "I think it has been a sabotage of the entire system of justice in this court," *id.* at 435.

43. *Sacher*, 343 U.S. at 9-10.

44. *Id.* at 10. The citation could not have occurred in private because by definition, contempt is a public crime and must be punished as such. *See In re Oliver*, 333 U.S. 257, 274-75 (1948).

nipulate the trial. "Reasons for permitting straightway exercise of summary power are not reasons for compelling or encouraging its immediate exercise."⁴⁵ The prejudice caused by attorney contempt citations should not become grounds for mistrial.⁴⁶ The Court's reasoning implies that discretion as to the time of citation and sentencing is necessary to avoid offensive use of contemptuous conduct. Requiring the trial judge to exercise summary contempt power immediately could emasculate his or her ability to maintain order.

The Court in *Sacher* further reasoned that a delay may be preferable to ensure a well-considered judgment.⁴⁷ Summary contempt vests a great deal of power in the trial judge, power that may be subject to arbitrary and uncontrolled use.⁴⁸ The Supreme Court in *Sacher* concluded that forcing judges to use the power immediately or lose it would cause them to exercise it before fully considering the issue.⁴⁹ In many contempt cases the behavior of attorneys is directed at the judge personally.⁵⁰ While a judge should be expected to rise above personal attacks, a rule requiring immediate exercise of summary contempt may detract from carefully reasoned and calculated judgments.⁵¹ The Court identified appellate review as a remedy to hasty and heated judgments and as a protection for the vigorous advocacy of the trial bar.⁵² The Court did not analyze its practical effectiveness fully, however.⁵³

45. *Sacher*, 343 U.S. at 9-10.

46. *See id.* at 10.

47. *Id.* at 10.

48. The Supreme Court in *Sacher* recognized the potential for abusing the summary contempt power. *See id.* at 12.

49. *Id.* ("If we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment.").

50. *Id.* at 9 (suggesting that an attorney should not resist or insult the judge, but should note his objection and preserve his point for appeal).

51. *But see infra* notes 70-90 and accompanying text.

52. *Sacher*, 343 U.S. at 12-13.

53. Justice Black's dissent alluded to the inadequacy of appellate review in this case because the appellate court failed to scrutinize the record as presented. The record was very long and the trial judge, instead of including a specific description of the actions he considered contemptuous, merely entered the whole transcript of thousands of pages into the certificate of contempt. Justice Black blamed this cursory treatment of the record on the lack of traditional criminal proceedings. He argued that, had a hearing ensued, the appellate court would have been forced to make a more well-reasoned decision:

The dissents of Justices Black⁵⁴ and Frankfurter⁵⁵ provided the basis for the Court's subsequent adoption of the narrower view of the contempt power. They chose to rely on the necessity rationale rather than the efficiency rationale, believing that the need for summary proceedings is less compelling when the crisis has passed. Adopting the sentiments of Justice Holmes, Justice Black concluded that when immediate action is not necessary, courts should treat a contempt like any other breach of law and that it "should be dealt with as the law deals with other illegal acts," providing a full panoply of procedures.⁵⁶

Justice Black also considered the added value of procedural safeguards when the judge had been involved personally.⁵⁷ The appendix in *Sacher*⁵⁸ disclosed a personal animosity between the judge and the defense counsel. Additionally, the trial involved a sensitive, highly controversial issue that may have caused the judge to harbor prejudices that affected his objectivity. In the hands of one so influenced, the contempt power is an awesome weapon.

Justice Frankfurter's dissent centered on two themes: the importance of procedural regularity and the scope of the summary power when the judge is the target of the attack or insult. Recognizing the summary contempt power as an exception to due process, he defined the power as a means of assuring the enforcement of justice according to the law.⁵⁹ Observing the open-ended language of rule 42(a), Frankfurter reasoned that the rule was subject to a limitation inherent in all grants of power: The power must be used

A fair review requires scrutiny of 13,000 pages of evidence most of which is irrelevant Such a record obscured these lawyers' trial conduct in a maze of evidence that has nothing to do with their own guilt or innocence. It is not surprising that this court shrinks from reading such a record; it refuses to do so. No assertion is made that the Court of Appeals waded through it Such an "inadequate" basis of review is to be expected since no hearing was held which could have framed concrete issues and focused attention on evidence relevant to them.

Id. at 18-19 (Black, J., dissenting); see *infra* note 139 and accompanying text.

54. *Sacher*, 343 U.S. at 14 (Black, J., dissenting).

55. *Id.* at 23 (Frankfurter, J., dissenting).

56. *Id.* at 22 (Black, J., dissenting) (quoting *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 425-26 (1918) (Holmes, J., dissenting)).

57. *Id.*

58. *Id.* at 42.

59. *Id.* at 24 (Frankfurter, J., dissenting).

fairly for the purpose conferred.⁶⁰ Use of the contempt power in a way contrary to traditional due process therefore must be justified by some compelling necessity,⁶¹ such as maintaining order in the court or salvaging the proceedings. Frankfurter indicated that if a judge has been personally attacked or insulted, only a compelling necessity will justify use of the summary power during trial;⁶² however, when a judge waits until the end of the trial to exercise the power after being personally involved, no possible necessity exists to justify a summary exercise of the court's contempt power.⁶³ Justice Frankfurter pointed out also that rule 42(a) permits, but does not command, summary punishment of all direct contempts.⁶⁴ Justice Frankfurter's dissent foreshadowed the later line of cases limiting exercise of summary power when a judge is "personally embroiled" with the alleged contemnor.⁶⁵

THE SECOND APPROACH

In *Bloom v. Illinois*,⁶⁶ the Supreme Court dealt a forceful blow to the expansive view of summary contempt power formulated in *Sacher*. *Bloom* involved the constitutional right to a jury trial for an indirect contempt punished by a two-year prison term. The contemnor had petitioned to probate a will he knew had been falsely prepared and executed after the death of the testator, thus leading to the contempt conviction in the state court. The Supreme Court held that an indirect contempt carrying a "serious" punishment required a jury trial.⁶⁷

The Court did not consider punishment for direct contempt in federal court in *Bloom*. The Court did introduce rule 42(a) into its analysis, however, noting that the right to a jury trial did not at-

60. *Id.* at 26.

61. *Id.* The two restrictions Justice Frankfurter noted are that: 1) no judge should sit in a case on which he is personally involved and 2) no criminal punishment should be meted out without notice and hearing unless overriding necessity precludes such indispensable safeguards. *Sacher*, 343 U.S. at 29-30 (Frankfurter, J., dissenting); see *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821).

62. 343 U.S. at 37.

63. *Id.* at 36-37.

64. *Id.* at 29, 36-37.

65. See *infra* notes 70-90 and accompanying text.

66. 391 U.S. 194 (1968).

67. *Id.* at 198-200, 202.

tach to direct contempts because, it assumed, direct contempt constitutes a "petty" offense.⁶⁸ More significantly, the Court recognized that rule 42(a) was not only based on the premise that fact-finding is unnecessary for contempts committed in the presence of the judge. Instead, the Court stated, summary contempt "also rests on the *need to maintain order* and a deliberative atmosphere in the courtroom."⁶⁹ Thus, the Court acknowledged the necessity rationale as a basis for rule 42(a).

Personal Embroilment

As interpreted in *United States v. Meyer*,⁷⁰ *Sacher* held that personal attacks on the trial judge never could extinguish the trial judge's summary power under rule 42(a), even after the trial's completion, because contempt occurring in the presence of the court is the only prerequisite to vesting of the summary power in the trial judge.⁷¹ Courts since have eroded this interpretation of *Sacher* in regard to the adjudication of contempt charges when the judge is the target of contempt.

Two years after *Sacher*, the Supreme Court decided *Offutt v. United States*.⁷² In *Offutt*, the Court refused to allow the trial judge who cited the contempt to sit on the post-trial contempt hearing because it feared judicial prejudice. The judge had been "personally embroiled" in a continuing conflict with the alleged contemnor.⁷³

The relationship between the judge and the defense counsel in *Offutt* is similar to aspects of *Sacher*; in both cases the judge's statements tended to provoke a hostile reaction from the contemnor. Also, both trial judges waited until the conclusion of the trial

68. See *id.* at 210. Presumably, the Court intended that the right to a jury trial would apply to direct contempts subject to "serious" punishment. The Court stated that no exception to the jury trial right should be made for disorders in the courtroom. *Id.* The only reason that rule 42(a) summary punishment could not be applied is that direct contempts are "placed . . . under the rule that petty crimes need not be tried to a jury." *Id.*

69. *Id.* (emphasis added).

70. 462 F.2d 827 (D.C. Cir. 1972).

71. *Id.* at 835.

72. 348 U.S. 11 (1954). During an abortion trial, the court held defendant's attorney in contempt for disregarding the court's rulings and overstepping the bounds of aggressive advocacy. *Id.* at 12; see *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1953).

73. *Offutt*, 348 U.S. at 17.

to cite the contempt; thus, they did not exercise summary power because of any compelling need to restore order in the courtroom.⁷⁴ In contrast to *Sacher*, however, the Court in *Offutt* reversed the contempt conviction and remanded the case for reconsideration by a different trial judge—one who had not been involved personally in a clash with the defense counsel.⁷⁵ As in his dissent in *Sacher*, Justice Frankfurter, now writing for the majority, emphasized the aspect of procedural regularity in the fair administration of justice.⁷⁶ The Court recognized that despite their best efforts, judges can become involved personally in such situations. Without condoning the contemptuous behavior of the lawyer, therefore, the Court applied a rule first enunciated in *Cooke v. United States*:⁷⁷ When conditions become impracticable, or when delay would not injure a public or private right, a judge properly may ask another judge to take his place “in a case of contempt by personal attack upon him.”⁷⁸

The Court has continued this trend toward narrowing summary contempt power in cases of personal attacks on the judge using the necessity rationale for support. In *Mayberry v. Pennsylvania*,⁷⁹ the judge remained detached and restrained⁸⁰ despite the contemnor’s

74. See *id.* at 12; *Sacher*, 343 U.S. at 3, 42-89.

75. *Offutt*, 348 U.S. at 17-18.

76. *Id.* at 17.

77. 267 U.S. 517 (1925).

78. *Offutt*, 348 U.S. at 14-15 (quoting *Cooke v. United States*, 267 U.S. 517, 539 (1925)). But see *Ungar v. Sarafite*, 376 U.S. 575 (1964) (finding trial judge not “personally embroiled” and thus allowed to sit on the post-trial hearing).

79. 400 U.S. 455 (1971).

80. The Court factually distinguished *Offutt*, recognizing that in *Mayberry* the judge had not become personally embroiled. *Id.* at 465.

Justice Harlan, concurring in *Mayberry*, observed that the severity of the 22-year sentence imposed for the contempt charge may suggest partiality. *Id.* at 469 (Harlan, J., concurring). Similarly, in a later case the Court suggested that the four and one-half year sentence imposed reflected the extent of the judge’s involvement. *Taylor v. Hayes*, 418 U.S. 488, 502-03 (1974).

In addition to requiring a new judge for a hearing under the “personal embroilment” theory, the length of sentences imposed in *Mayberry* and *Taylor* also would require that the accused contemnor be granted the right to a jury trial. In *Bloom v. Illinois*, 391 U.S. 211 (1968), the Court held that the right to a jury trial attached to contempt citations subject to “serious” punishment. *Id.* at 198-200, 202; see *supra* text accompanying notes 67-68. In reference to indirect contempts subject to “serious” punishment, the Court stated:

We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and are not persuaded that

abusive attacks on him.⁸¹ Despite this detachment, however, the Supreme Court held the use of the summary power inappropriate. The Court reasoned that when judges wait until the end of the trial to act, they should ask a fellow judge to take their place, especially when "the marks of the unseemly conduct have left personal stings No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication."⁸²

By the time the Court decided *Taylor v. Hayes*⁸³ and *Codispoti v. Pennsylvania*⁸⁴ in 1974, the necessity rationale firmly was implanted, as evidenced by the Court's reference in *Taylor* to the "usual justification of necessity."⁸⁵ In *Codispoti*,⁸⁶ the Court referred to the lack of an "overriding necessity for instant action to preserve order and no justification for dispensing with the ordinary rudiments of due process."⁸⁷ *Taylor* and *Codispoti* also involved situations in which the judge cited the contempts as they occurred

the additional time and expense possibly involved in submitting serious contempts to juries will seriously handicap the effective functioning of the courts When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power.

Id. at 208-09. Although discussing summary punishment of indirect contempts, the reasoning readily applies to direct contempts. The Court made a conscious choice in favor of procedural regularity over efficiency whenever the punishment is serious.

81. The defendant, charged with prison breach and holding hostages in a penal institution, elected to represent himself at trial. In addition to repeated interruptions, outbursts, and refusals to obey the court, Mayberry verbally assaulted the judge, calling him a "dirty sonofabitch," *id.* at 456; referred to the judge as a "dirty tyrannical old dog," *id.* at 457; said "I ask your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?" *id.* at 458; and said "Go to hell. I don't give a good God damn what you suggest, you stumbling dog," *id.* For a more detailed account of the exchange see *id.* at 456-62.

82. *Id.* at 463-64, 465.

83. 418 U.S. 488 (1974). See generally Note, *Taylor v. Hayes: A Case Study in the Use of the Summary Contempt Power Against the Trial Attorney*, 63 Ky. L.J. 945 (1975) (examination of *Taylor* and survey of the use of summary contempt proceedings to punish a defense attorney for conduct during trial).

84. 418 U.S. 506 (1974).

85. *Taylor*, 418 U.S. at 497 (citing *Offutt v. United States*, 348 U.S. 11 (1954), as precedent).

86. *Codispoti* was a co-defendant in the *Mayberry* trial. 418 U.S. at 507. *Codispoti v. Pennsylvania* was the appeal from the contempt hearing with a different judge, as ordered in *Mayberry*, 400 U.S. 455 (1971). The issue on appeal focused on the defendant's right to a jury trial on the contempt charge.

87. *Codispoti*, 418 U.S. at 515.

but deferred sentencing until after the trial. Finding that the judge had become "embroiled in a running controversy with petitioner," the Court in *Taylor* concluded that precedent⁸⁸ required adjudication by another judge.⁸⁹

These rulings stand in sharp contrast to the broad authority granted in *Sacher* on relatively similar facts. Taken together, these cases require an inquiry not only into actual bias, but also into the likelihood or appearance of bias. Even the appearance of bias requires recusal to satisfy both the reality and the appearance of justice.⁹⁰

Immediate Need Requirement

*Harris v. United States*⁹¹ was an early Supreme Court attempt to narrow the scope of the summary contempt power. It marked a turning point in the evolution of the contempt power because it focused on the exercise of summary power to vindicate the court's authority and to preserve the judicial process. In a short five-to-four opinion, the Court characterized the summary contempt power as designed to fill the need for immediate penal vindication of the dignity of the court.⁹² In *Harris*, a witness testifying before a grand jury refused to answer a question after being granted immunity from prosecution. Presumably to coerce the testimony, the witness and grand jury were brought before the district court. The judge repeated the questions, directed the witness to answer, and affirmed the grant of immunity. When the witness still refused to respond, the judge treated the witness's conduct as a direct con-

88. See *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964); *Offutt v. United States*, 348 U.S. 11 (1954).

89. *Taylor*, 418 U.S. at 501-02.

90. See, e.g., *id.* at 501. The Supreme Court also has required disposition by an impartial judge when the judge adopts an adversarial position with respect to the alleged contemnor, even if he has not been personally attacked. See, e.g., *Johnson v. Mississippi*, 403 U.S. 212, 215-16 (1971) (trial judge had been named as a defendant by alleged contemnor in civil suit); *In re Murchison*, 349 U.S. 133, 137-39 (1955) (contemnor refused to answer questions at trial which previously had been propounded by trial judge acting as a one-man grand jury pursuant to Michigan law).

91. 382 U.S. 162 (1965).

92. *Id.* at 164.

tempt warranting summary punishment.⁹³ The Supreme Court reversed the contempt charge, holding first that if any contempt had occurred at all, it had occurred before the grand jury, not the court. In addition, the Court held that the absence of a justifiable immediacy precluded use of the summary power.⁹⁴

Because rule 42(a) requires that the contempt occur "in the actual presence of the court," the ruling that the contempt did not occur before the court would have provided sufficient grounds for reversal. Having surmised that the witness was brought before the judge for the purpose of satisfying rule 42(a), the Court could have limited the scope of its decision by holding simply that "presence" under rule 42(a) cannot be manufactured. The Court explicitly stated that the use of rule 42(a) is reserved for "those unusual situations . . . where instant action is necessary to protect the judicial institution itself."⁹⁵ In essence, the Court adopted the necessity rationale for justifying use of the summary contempt power in federal courts.

Harris, coupled with *United States v. Wilson*,⁹⁶ decided ten years later, has effectively imposed an additional requirement for properly invoking the summary power. A direct threat impeding the judicial process seems to have become a prerequisite.⁹⁷

Wilson sustained use of the summary power under facts quite similar to those of *Harris*. As in *Harris*, the Court in *Wilson* addressed the refusal of a witness to testify after having been granted immunity, but in *Wilson* the setting was a trial, not a grand jury

93. *United States v. Harris*, 334 F.2d 460, 461-62 (2d Cir. 1964), *rev'd*, 382 U.S. 162 (1965).

94. *Harris*, 382 U.S. at 164, 165.

95. *Id.* at 167.

96. 421 U.S. 309 (1975).

97. One might argue that a key witness's refusal to testify before a grand jury impedes the criminal judicial system. *But see United States v. Wilson*, 421 U.S. 309, 318 (1975) (explaining that the grand jury could interview other witnesses or move on to other investigations).

In his dissent in *Harris*, Justice Stewart pointed out that a grand jury, as merely an arm of the court's process, has no power to compel witnesses to testify. Because the court has the power to summon the witnesses to the grand jury, the court also must hold the power to make witnesses testify. Thus, such a refusal arguably occurs in the presence of the court and, therefore, correctly can be classified as a direct contempt warranting use of the summary power. *Harris*, 382 U.S. at 167 (Stewart, J., dissenting).

hearing.⁹⁸ Although distinguishing *Harris* on this fact, the Court in *Wilson* used the same basic analysis that it had applied in *Harris*, concluding that a greater obstruction was likely to result in *Wilson*-type cases than in *Harris*-type cases.⁹⁹ The Court in *Wilson*, though purporting to limit *Harris*, merely reaffirmed that the refusal to testify in court had occurred in the presence of the court and properly was punishable by summary contempt *because* it has an obstructive effect.¹⁰⁰ The contempt power is thus necessary to prevent the obstruction.¹⁰¹

Wilson is important for another reason. It advanced a third rationale for use of the summary contempt power. Instead of relying on efficiency or immediate vindication of the court's dignity, the Court in *Wilson* advanced a coercive function. The trial judge in *Wilson* told the contemnor that the judge would reduce or even void the sentence if the contemnor changed his mind and testified.¹⁰² The Supreme Court sustained this purpose.¹⁰³ Typically the distinguishing factor between civil and criminal contempts,¹⁰⁴ this coercive feature is novel to direct criminal contempt convictions.

While advocating a return to a broader discretionary power, the Court in *Wilson* effectively affirmed the trend toward a more restrictive use of the power. Nowhere does the Court consider the *Sacher* conclusions that summary contempt refers only to the process and is available merely because the contempt occurred in the presence of the judge. Rather, the Court in *Wilson* required an investigation into the effect of the behavior on the proceeding, thereby forcing a judge to justify his decision to find one in contempt in terms of necessity and immediacy. The underlying theme

98. *United States v. Wilson*, 488 F.2d 1231, 1232 (2d Cir. 1973), *rev'd*, 421 U.S. 309 (1975).

99. *Wilson*, 421 U.S. at 318-19.

100. *Id.* at 314-16. "*Harris*, at most, now stands for nothing more than the proposition that a witness' refusal to answer grand jury questions is not conduct 'in the actual presence of the court.'" *Id.* at 321 (Blackmun, J., concurring).

101. *Id.* at 319; *see also Harris*, 382 U.S. at 164.

102. *Wilson*, 421 U.S. at 312.

103. "[S]ummary contempt must be available to vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify. Whether such incentive is necessary in a particular case is a matter the Rule wisely leaves to the discretion of the trial court." *Id.* at 316-17 (citation omitted); *see also Kuhns, supra* note 22, at 92-98 (discussing the coercive feature of criminal contempt in the context of *Wilson*).

104. *See supra* note 1 (discussing the distinction between civil and criminal contempts).

is to allow a trial judge to "act swiftly and firmly to prevent contumacious conduct from disrupting the orderly progress of a criminal trial."¹⁰⁵

Appellate Application of Harris and Wilson

Although *Harris* and *Wilson* arguably rely on the same necessity justification of the summary contempt power, the divergent results in the two cases has led to inconsistent application of the cases' principles in the federal circuits. Following the appellate cases chronologically, the circuit courts have tended to limit the summary contempt power through the necessity rationale; however, the United States Court of Appeals for the Ninth Circuit has curtailed the importance of necessity in reviewing the exercise of summary contempt power. Furthermore, even when limiting the reach of summary contempt power, the Ninth Circuit has done so within a *Sacher* "full knowledge of the facts" framework.

The Ninth Circuit took a *Sacher*-like view of summary contempt in its en banc rehearing of *In re Gustafson*.¹⁰⁶ The Court read *Harris* and *Wilson* as defining the prerequisites of summary punishment to be only those set out in rule 42(a),¹⁰⁷ ignoring those parts of the opinions calling for a compelling exigency. Although the court in *Gustafson* recognized that the Supreme Court in *Wilson* distinguished *Harris* on the need for immediate action, it concluded that the importance of this factor lies in the requirement that the trial judge consider the necessity of summary punishment.¹⁰⁸ The Ninth Circuit focused on whether the trial judge abused his discretion in deciding to impose summary contempt.

105. *Wilson*, 421 U.S. at 315-17.

106. 650 F.2d 1017 (9th Cir. 1981) (en banc). The defense attorney, Gustafson, read his closing argument to the jury from a prepared text. He read so fast that the judge had to ask him 19 times to slow down. Ultimately the court had to tape Gustafson's remarks in order to transcribe them. In addition, during the trial Gustafson suggested to the jury that the court and prosecutor had conspired to obstruct his defense of his clients. *Id.* at 1018-19. Finding that Gustafson's conduct neither created a material obstruction of the trial nor presented a compelling need for immediate action, the court initially required a hearing for adjudication of the contempt charge. *In re Gustafson*, 619 F.2d 1354 (9th Cir. 1980). Upon rehearing en banc, the court affirmed the exercise of the summary power. *In re Gustafson*, 650 F.2d 1017 (9th Cir. 1981) (en banc).

107. *Gustafson*, 650 F.2d at 1021-22.

108. *Id.* at 1022.

The court formulated a standard of review which gives "great deference to a trial judge's explicit determination that plenary procedures are inadequate and summary procedures are necessary."¹⁰⁹ Under this standard of review, appellate courts rarely would overturn a trial judge's action as long as he or she stated for the record that summary procedures were required. Because the trial judge needs only to consider the necessity of summary punishment under *Gustafson*, the case runs contrary to the trend narrowing the trial judge's summary contempt power.¹¹⁰

The vigorous dissent by Judge Boochever in *Gustafson* was more consistent with the reasoning in *Harris* and *Wilson*. Judge Boochever interpreted these two cases as imposing a prerequisite of exigency and denied that the trial court has discretionary power in the summary contempt decision—what Judge Boochever identified as the decision to dispense with due process requirements.¹¹¹

In *Matter of Heathcock*,¹¹² the United States Court of Appeals for the Eleventh Circuit provided an analysis more harmonious with *Harris* and *Wilson* than that found in *Gustafson*. The Eleventh Circuit clearly identified the purpose of the summary contempt power as providing a court with "immediate means of discipline to vindicate and preserve the authority of the court."¹¹³

109. *Id.* at 1023.

110. See Comment, *Summary Criminal Contempt: Deference to the Trial Court*, 12 GOLDEN GATE U.L. REV. 109 (1982) (discussing the implications of the *Gustafson* decisions).

111. *Gustafson*, 650 F.2d at 1023 (Boochever, J., dissenting).

112. 696 F.2d 1362 (11th Cir. 1983).

113. *Id.* at 1365. The Eleventh Circuit recently had the opportunity to address the necessity rationale more explicitly. In *United States v. Turner*, 812 F.2d 1552 (11th Cir. 1987), the Eleventh Circuit reversed the summary contempt conviction of an attorney who followed a particular line of questioning against the trial judge's explicit orders. The appellate court acknowledged that the "explicit pre-conditions to resort to Rule 42(a) were met in this case." *Id.* at 1568 (emphasis added). The court noted, however, that "authoritative judicial precedent embodies at least one further pre-condition: that there has been an actual obstruction of justice." *Id.* (citing *In re McConnell*, 370 U.S. 230, 234 (1962)). The court concluded:

[W]e cannot accept that even if it constituted a clear violation of a clear order, the single question and the answer it evoked constituted an actual obstruction of justice, permitting resort to Rule 42(a). The decision whether to resort to Rule 42(a) summary procedure, as contrasted with Rule 42(b)'s more elaborate procedure, is spoken of as a matter of discretion. Viewed in those terms, we conclude that the discretion was abused.

Id.

The trial court in *Heathcock* issued a summary contempt citation to punish a violation of a court order enjoining employees of a nursing facility from striking and demonstrating in front of the building. When the judge was notified that the employees persisted, he went to the nursing home, observed the behavior, identified himself as the presiding judge, and proceeded to find a number of the petitioners in contempt of court.¹¹⁴ The issue on appeal was whether this behavior had occurred in the presence of court so as to make summary contempt an appropriate remedy. The court of appeals held that although "in the presence of court" was not strictly limited to the courtroom, some degree of formality was required to sustain the charge outside of the courtroom. The informality of this situation defeated the propriety of being "in the presence of court."¹¹⁵

Following *Harris* and *Wilson*, the court in *Heathcock* analyzed the scope of summary contempt power within the confines of the necessity rationale.¹¹⁶ Instead of focusing on the "immediacy" aspect of the necessity rationale, the court limited the scope of summary contempt power through a narrow reading of the "in the presence of court" requirement of rule 42(a).¹¹⁷ The court in *Heathcock* did not need to invoke an immediacy analysis because the judge left the court to find the contemptuous conduct.

The United States Court of Appeals for the Second Circuit decided *United States v. Lumumba*¹¹⁸ using a *Wilson* immediacy analysis. In a case factually similar to *Sacher*,¹¹⁹ the court held

114. *Id.* at 1363-64.

115. *Id.* at 1366.

116. *See id.* at 1365. The court stated that the purpose of summary contempt is "to provide the court with an immediate means of discipline to vindicate and preserve the authority of the court." *Id.*

117. Historically, appellate courts have affirmed broad interpretations of the "in the presence of court" requirement. *See, e.g.,* *Newby v. District Court*, 259 Iowa 1330, 147 N.W.2d 886 (1967) (sustaining judge's power summarily to hold in contempt two juveniles, against whom proceedings were pending in the judge's court, who had attacked the judge outside his home late one night); *People v. Higgins*, 173 Misc. 96, 16 N.Y.S.2d 302 (Sup. Ct. 1939) (holding that a deputy sheriff, who secretly purchased liquor for jurors, became drunk, and had sexual intercourse with a woman juror while guarding the jury, was guilty of contempt in the presence of court).

118. 741 F.2d 12 (2d Cir. 1984).

119. *Lumumba* successfully represented one of 11 co-defendants on charges arising from a Brinks robbery. *United States v. Shakur*, 543 F. Supp. 1059 (S.D.N.Y. 1982). Twice during

that by waiting until the end of the trial to adjudicate an attorney in contempt, the trial judge had lost the power to invoke a summary conviction under rule 42(a).¹²⁰ Drawing on the concept of least possible power adequate to the end proposed,¹²¹ the court reasoned that due process rights are sometimes sacrificed for order in the court, but when the interest in order need not be vindicated, the least possible power to accomplish the ends perceived consists of a rule 42(b) proceeding.¹²²

Acknowledging the similarity to *Sacher*, the court dismissed *Sacher* as "not the present rule" and as having "limited vitality as precedent, even though it has not been expressly disavowed."¹²³ It relied on Supreme Court decisions after *Sacher*¹²⁴ to trace the justification of summary punishment as an "immediate necessity to uphold a tribunal's authority."¹²⁵

The case of *United States v. Flynt*,¹²⁶ decided in the Ninth Circuit after *Gustafson*, does not use a *Harris/Wilson* analysis but still effectively narrows the scope of the summary contempt power by analyzing the requirement that the judge observe all relevant

the five-month trial, the trial judge cited Lumumba for contempt. He did not, however, finally adjudicate the charges until the trial concluded. Lumumba repeatedly refused to remain seated and silent during voir dire in direct defiance of the court's order, provoking the first charge. The second charge came after the court directed Lumumba to make an offer of proof with respect to his cross-examination of a government witness. Lumumba concluded his offer of proof by remarking, "[A]nother point is I would like some kind of ruling on why you won't let me do what you let them do and then have the audacity to sit on the bench and claim you are fair." *Lumumba*, 741 F.2d at 14; see *supra* note 42.

120. *Lumumba*, 741 F.2d at 15-17. As an example of the difficulty inherent in policing trial court actions through appellate review of contempt citations, on remand the district judge refused to restrict the previous trial judge's power to punish for summary contempt to the extent the appellate court intended. See *United States v. Lumumba*, 603 F. Supp. 913, 919-20 (S.D.N.Y. 1985). Although never disapproving of the necessity justification, the district court broadly construed the hearing requirement. The defendant had notice that his conduct was considered contemptuous, compare *id.* with *Taylor v. Hayes*, 418 U.S. 488 (1974), and the district court interpreted the opportunity granted by the trial judge for the contemnor to speak in his own behalf before punishment was imposed as adequate to meet due process requirements of notice and hearing. 603 F. Supp. at 920.

121. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227-28 (1821).

122. *Lumumba*, 741 F.2d at 16.

123. *Id.*

124. *Taylor v. Hayes*, 418 U.S. 488 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Bloom v. Illinois*, 391 U.S. 194 (1968); *Offutt v. United States*, 348 U.S. 11 (1954).

125. *Lumumba*, 741 F.2d at 16.

126. 756 F.2d 1352 (9th Cir. 1985).

facts. On its face, the conduct of the defendant, Larry Flynt, was blatantly contumacious. He subjected the judicial authorities before whom he appeared to a most vulgar onslaught of obscenities and verbal abuse,¹²⁷ but because some legitimate question existed as to Flynt's mental state and his ability to form the requisite intent to commit a contempt, the Ninth Circuit deemed the use of summary power inappropriate.¹²⁸

The court in *Flynt* acknowledged dual justifications for the summary contempt power. First, the need to overcome obstructions to ongoing proceedings mandates a summary proceeding, and second, because the judge is personally aware of the conduct, a hearing becomes unnecessary.¹²⁹ Showing less deference to the discretion of trial judges than in *Gustafson*, the court recognized that appellate courts have found abuses of discretion when the power is not exercised in a manner consistent with both justifications.¹³⁰

The court in *Flynt* used a *Sacher* analysis, requiring the judge to have full and immediate knowledge of the relevant facts. It concluded that a rule 42(b) proceeding was necessary to inform the court of events not within its knowledge, such as Flynt's mental state.¹³¹ Because Flynt's mental capacity to commit a contempt was a "substantial issue," the court held that a rule 42(b) hearing should have ensued.¹³²

The United States Court of Appeals for the Sixth Circuit addressed summary contempt in *Vaughn v. City of Flint*.¹³³ Vaughn was accused of engaging in the unauthorized practice of law after he purported to represent the residents of Oak Park through a judicial process. The court in *Vaughn* relied upon dual grounds to

127. See *id.* at 1355 n.1, 1357 nn.4-6 (reporting portions of the record detailing the contumacious exchanges).

128. *Id.* at 1366.

129. *Id.* at 1363.

130. Whether the Ninth Circuit in *Flynt* elevated immediacy from a factor that must be considered by the trial judge, as in *Gustafson*, to a requirement for use of summary contempt power is unclear. The court first stated that the exercise of summary contempt power *must* be consistent with the justifications enumerated for rule 42(a). See *id.* The court then diluted the apparent requirement, however, when it noted that "appellate courts have found abuses of discretion when *both* justifications" are not met. *Id.*

131. *Id.* at 1365.

132. *Id.* at 1364-66.

133. 752 F.2d 1160 (6th Cir. 1985).

reverse the contempt citation, possibly going beyond *Harris* in its relaxation of summary contempt power. First, the court relied on the necessity rationale when it acknowledged that the trial judge's order striking the pleadings and dismissing the cause disposed of the case, thus eliminating any need for "summary vindication of the court's dignity and authority."¹³⁴ Second, the court devoted the bulk of its analysis to the lack of a showing of intent to obstruct, one of the elements underlying a finding of contempt.¹³⁵ By emphasizing the requisite intent finding, the court could forestall use of the summary contempt power in all but the most disruptive instances of contempt.

This survey of recent federal circuit contempt cases demonstrates that the majority view now embraces the necessity rationale. In addition, courts have interpreted carefully other requisite elements of the contempt violation to limit a trial judge's power to punish summarily for direct criminal contempts. For example, the Eleventh Circuit narrowly construed the "in the presence of the court" requirement of rule 42(a),¹³⁶ and the Sixth Circuit emphasized the "intent" to commit the contempt in a manner that limits the scope of summary power.¹³⁷

OPINION, ANALYSIS AND CRITICISM

A concern that has plagued courts and scholars in considering the desirability of a summary contempt power is its potential for abuse.¹³⁸ Even with the best intentions of dispensing justice, judges who personally have been insulted can lose their objectivity in adjudicating a contempt charge. A judge who has become emotionally charged by personal attacks carries a powerful weapon in the form of the summary contempt power. Responding to this dilemma, the Supreme Court has narrowed the type of cases in which a judge who presided over the contemptuous behavior may preside over

134. *Id.* at 1169 (quoting *Harris v. United States*, 382 U.S. 162, 164 (1965)).

135. *See supra* note 15.

136. *See supra* notes 112-17 and accompanying text.

137. *See supra* notes 133-35 and accompanying text.

138. *See, e.g.*, *Bloom v. Illinois*, 391 U.S. 194 (1968); *Sacher v. United States*, 343 U.S. 1 (1952); *see also* *Dobbs*, *supra* note 1; *Kuhns*, *supra* note 22; *Comment*, *supra* note 35; *Comment*, *supra* note 110. *See generally* *Bloom*, 391 U.S. at 202-08 (historically tracing the abuse question and various attempts to address it).

the contempt hearing.¹³⁹ This step, however, may not address the problem sufficiently.

Use of the summary contempt power to vindicate a personal grudge is contrary to the policies which justify the contempt power. From the *Sacher* perspective, a judge's perception of the event is the determinative factor, but a judge's perception might be distorted by personal involvement. Such an involvement does not fit into the efficiency rationale because true efficiency requires valid results in addition to swift disposition. The efficiency rationale presupposes a competent fact finder, for only on that assumption is a hearing a useless formality.¹⁴⁰ Considerations of efficiency pale when compared to the possibility that a judge may abuse the power and infringe on fundamental notions of fairness through procedural due process. If a procedure is efficient, but inherently unfair, it cannot be rationalized as an acceptable method of dealing with undesirable behavior.

From the rationale of the *Harris/Wilson* progeny, the possibility that a judge may abuse the contempt power to vindicate a personal grudge is also problematic.¹⁴¹ A *Sacher* criticism of the necessity rationale is that it encourages judges to enter contempt convictions when they are most likely to be acting on impulse, still "smarting from the attack," for fear that if they wait, a hearing must ensue.¹⁴² If a judge, hastily imposing a contempt citation under the immediacy requisite, is likely to act from a purely emotional response to the attack, the problem of judicial abuse of discretion is magnified. Neither rationale squares with the problem for, instead of contributing to the answer, each contributes to the dilemma.

Courts have tended to respond to the abuse problem by offering appellate review as a remedy.¹⁴³ Practically, however, one must

139. See, e.g., *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 388 (1974); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Offutt v. United States*, 348 U.S. 11 (1954).

140. See *United States v. Meyer*, 462 F.2d 827, 838 (D.C. Cir. 1972).

141. Indeed, as early as *Bloom v. Illinois*, the Supreme Court recognized the danger of abuse. In calling for a jury trial, the Court found protection against arbitrary exercise to be "an even more compelling argument" in contempt cases than in cases of other serious crimes. 391 U.S. 194, 202 (1968).

142. *Sacher v. United States*, 343 U.S. 1, 10-11 (1952).

143. See, e.g., *Green v. United States*, 356 U.S. 165, 199-200 (1958); *Sacher v. United States*, 343 U.S. 1, 10-13 (1952).

consider the effectiveness of such review. Two basic criticisms of appellate review in contempt cases exist. The first concerns the adequacy of the substantive review—what the court will examine and what standard it will use. The second concerns the record itself and how well it preserves the exchange.

When an appellate court reviews a summary contempt charge, exactly what the court will consider varies. The most disturbing recent case on this point is *In re Gustafson*,¹⁴⁴ in which the Ninth Circuit confined its inquiry to whether the trial court abused its discretion in exercising the summary contempt power. The court in *Gustafson* did not examine whether the contemnor's behavior was, in fact, contemptuous.¹⁴⁵ The standard of review that the court chose to apply was that of "great deference to a trial judge's explicit determination that plenary procedures are inadequate and summary procedures are necessary."¹⁴⁶ This standard "will safeguard an alleged contemnor from only the most flagrant abuses."¹⁴⁷ *Gustafson* suggests that the trial judge has not abused his discretion if he includes a conclusory statement in the contempt order that summary punishment is appropriate.¹⁴⁸ For an alleged contemnor to bring that decision into question may prove impossible.¹⁴⁹

Sacher exposes another possible inadequacy of appellate review. Will the court be willing to examine the record? Justice Black's dissent strongly maintains that when an appellate court is unwilling to wade through a lengthy record but merely sustains the trial court's decision that the contempt occurred, review is inadequate.¹⁵⁰

This problem identified by Black in *Sacher* coupled with the *Gustafson* analysis creates a potential for abuse that sharply conflicts with the due process considerations generally regarded as crucial to the disposition of criminal cases. If an appellate court

144. 650 F.2d 1017, 1021-22 (9th Cir. 1981).

145. *Id.* at 1022-23.

146. *Id.* at 1023.

147. Comment, *supra* note 110, at 113-14.

148. *Gustafson*, 650 F.2d at 1023.

149. Comment, *supra* note 110, at 114; see *supra* notes 106-11 and accompanying text.

150. *Sacher*, 343 U.S. at 14 (Black, J., dissenting); see *supra* note 53 and accompanying text.

fails to read and consider the record, gives great deference to a trial judge's conclusion that summary procedures are necessary, and reviews the decision with an eye only to abuse of discretion, little procedural protection is actually afforded an alleged contemnor. Under such circumstances, a contempt citation at the trial court level is final in all practical respects. To avoid this problem, when a trial judge suspends the usual requirements of notice and hearing by issuing a summary contempt order, appellate courts should review these appeals even more carefully than appeals of other cases where the judicial system has afforded such procedural safeguards.

The response of preventing judicial abuse only when the judge has become personally embroiled in the conflict is inadequate because it only addresses the situation in which the judge waits until after the trial to cite or punish the contempt.¹⁵¹ The response fails to address the situation in which judges punish contempt immediately after it occurs. Thus, appellate review affords less protection from immediate dispositions which may have ensued as a result of a judge's anger or hostility. Protection effectively is denied in cases when it is needed most.

One must not discount the need for a court to be able to control its proceedings. The contempt power of a court should not be interpreted so as to allow a contemnor to use it offensively. The system should not encourage contemptuous behavior by which the contemnor could so infuriate a judge that he or she has to be replaced. On several occasions the Supreme Court has stated that a contemnor cannot force a judge out of a case,¹⁵² thus confirming what the Court in *Sacher* identified as the "only discernible purpose of the contemptuous conduct."¹⁵³ To date, however, the Court has offered no practical guidance on how to avoid this result without suspending the contemnor's due process rights.

In order to conclude that more appellate review is necessary, one must consider the second criticism of review as a remedy. Wholly apart from the normative questions relating to the desirable extent

151. See *supra* notes 70-90 and accompanying text.

152. E.g., *Mayberry v. Pennsylvania*, 400 U.S. 455, 463-64 (1971); *Sacher v. United States*, 343 U.S. 1, 10 (1952); *Cooke v. United States*, 267 U.S. 517, 539 (1925).

153. *Sacher*, 343 U.S. at 10.

of review is the more basic question of the adequacy of review. The inherent tensions created by the adversarial nature of court proceedings unquestionably influences the atmosphere during trials. Transcribing into the record even that basic underlying backdrop is impossible. To further complicate the problem, a simple trial court record is unlikely to preserve adequately or allow re-creation of such other factors as previous relationships and exchanges between the judge and the contemnor, the context of this particular incident, the kind of substantive issue presented at trial, the non-verbal gestures, or the tone of voice. These inadequacies do not prove to be fatal defects in the usefulness of review if appellate courts recognize these limitations and are willing to consider outside evidence in addition to the trial record.

The direct/indirect distinction bears little relationship to the propriety of summary punishment for contempt. Even when the contemnor has acted in front of a judge in open court, thereby establishing a direct contempt, the judge may not have known all the relevant facts surrounding the supposed contemnor's behavior.¹⁵⁴ The more important concern from a fairness point of view is that the court saw or heard all the relevant evidence so that it can make the judgment. Once establishing that no fact is in controversy—the contemnor's mental capacity, for example—then a second level inquiry should follow. This inquiry should concern whether summary disposition is necessary in order to preserve the smooth administration of justice.¹⁵⁵ Arguably, the Ninth Circuit pursued this objective in *Flynt* when it recognized the two rationales of efficiency and necessity and then proceeded to evaluate the issue in light of consistency with both.¹⁵⁶

CONCLUSION

This Note surveys the rationales posited by courts in justification of the summary contempt power. Courts consistently have rec-

154. See, e.g., *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985) (mental capacity to form requisite intent was a fact at issue); *Vaughn v. City of Flint*, 752 F.2d 1160 (6th Cir. 19185) (finding no intent to obstruct).

155. See *Dobbs*, *supra* note 1, at 224; see also *United States v. Turner*, 812 F.2d 1552, 1568 (11th Cir. 1987); *supra* note 113.

156. See *supra* notes 129-30 and accompanying text.

ognized both the need for this judicial power and its potential for abuse. The checks against abuse, appellate review and the requirement of notice and hearing for adjudication of contempts not requiring immediate action, insufficiently protect the rights of individuals. Requiring notice and hearing for contempt citations issued after the trial is concluded result in hasty contempt citations during trial. If the standard of appellate review continues to give the trial judge wide discretion and the appellate courts refuse to review the factual record carefully, then serious questions of procedural due process violations arise.

The direct/indirect distinction is unrelated to the more convincing necessity rationale advanced to justify the summary contempt power. The most important consideration is that the judge has witnessed the relevant conduct and *needs* to act quickly.

Despite the possibility that a judge may have been prompted by improper motives to make a contempt citation, this Note does not argue for abolishing the summary power altogether. Instead, appellate courts should apply more scrutiny to the record in order to determine that the trial judge considered all relevant facts relating to the contempt, and also should consider the necessity of summary procedure.

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